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COLONEL LARRY YOUNGNER  
JOE HOLCOMBE vs UNITED STATES

February 17, 2021

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1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE WESTERN DISTRICT OF TEXAS  
3 SAN ANTONIO DIVISION

4 JOE HOLCOMBE, et al.,

5 Plaintiffs,

CIVIL ACTION NO. 5:18-cv-555-XR  
(Consolidated cases)

6 v.

7 UNITED STATES OF AMERICA,

8 Defendant.  
9  
10  
11  
12

13 REMOTE VIDEOTAPED DEPOSITION OF COLONEL LARRY YOUNGNER  
14 Taken By Counsel for Defendant  
(Pages 1-233)

15 Wednesday, February 17, 2021  
10:05 a.m. - 6:12 p.m.

16 By Zoom Videoconference  
17 Cape Coral, Florida 33909  
18 -----  
19  
20  
21

22 Remotely Reported By:  
Megan M. Soria  
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1 it was my experiences. And that's still there. 11:16:28

2 Absolutely. 11:16:30

3 Q. In your experiences that helped you form your 11:16:31

4 opinion, you never had any responsibility directly for 11:16:38

5 submitting fingerprints; correct? 11:16:43

6 A. Yes, ma'am. That is correct. We had 11:16:47

7 responsibility for submitting data like the report of 11:16:50

8 result of trial, that then triggered another agency like 11:16:53

9 OSI or the confinement facility or security forces, if 11:16:57

10 you will, to submit the required criminal history data. 11:17:01

11 Q. And did you -- you never supervised OSI or SFS 11:17:04

12 personnel in their duty to submit fingerprints; is that 11:17:12

13 right? 11:17:17

14 A. That's correct. I did not supervise them on 11:17:17

15 their duty to submit fingerprints. We would only answer 11:17:21

16 questions if asked. 11:17:25

17 Q. Let's go to the second duty that you stated in 11:17:27

18 your report. I'm looking at -- I'll pull it up, Page 34 11:17:35

19 of the report. Sorry. I've got to scroll here. 11:17:44

20 A. The second duty was the final disposition report 11:17:56

21 piece? 11:17:59

22 Q. Yes. That's what I'm going to ask you about. 11:17:59

23 I'm looking at Subparagraph B here, "duty two, final 11:18:02

24 disposition report preparation and submission." And you 11:18:06

25 see where I'm looking at that? 11:18:09

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1 regulations and instructions that were done for this 11:20:22  
2 case, with your prior knowledge and experience providing 11:20:25  
3 context for those; is that correct? 11:20:29

4 A. Yes. I think that's fair. 11:20:32

5 Q. In your previous experiences in the Air Force, 11:20:37  
6 were you ever -- did you ever have a responsibility for 11:20:40  
7 preparing or submitting the final disposition reports to 11:20:43  
8 the FBI? 11:20:47

9 A. I did not. No, ma'am. 11:20:48

10 Q. And did you ever supervise OSI or SFS personnel 11:20:49  
11 in their preparing or submitting final disposition 11:20:55  
12 reports? 11:21:00

13 A. No, ma'am. I did not. 11:21:01

14 Q. And then just going to throw this back up, 11:21:02  
15 Exhibit 2 back up. Looking at Subparagraph B1, and at 11:21:09  
16 the bottom of that paragraph, you state, "Unfortunately, 11:21:16  
17 had the Detachment 225 and the 49th SFS personnel 11:21:20  
18 submitted Kelley's criminal history data, even under the 11:21:27  
19 erroneous timeframe, Kelley would not have been able to 11:21:32  
20 purchase the weapons he used in the Southern Springs 11:21:37  
21 shooting"; did I read that correctly? 11:21:40

22 A. You did read that correctly. 11:21:42

23 Q. The erroneous appellate timeframe, as you 11:21:44  
24 discussed in the previous paragraph, that's based on 11:21:48  
25 your knowledge from the depositions that some of the 11:21:51

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1 report is that the purchases had the unfortunate effect 12:56:47  
2 of conditioning Kelley to know and understand that he 12:56:53  
3 was able to utilize federally licensed firearms dealers. 12:56:56

4 Can you define "conditioning"? 12:57:01

5 A. When someone engages in a practice and it gets 12:57:05  
6 reinforced over time. So one or two times might be the 12:57:09  
7 luck of the draw; three, four, five, six times. So when 12:57:17  
8 on December 2014, April 2016, June 2016, October 2017, 12:57:20  
9 Devin Kelley is able to go into an FFL dealer and obtain 12:57:27  
10 a weapon, he is getting reinforced, you know, positive 12:57:31  
11 reinforcement to him that this is something I can get 12:57:36  
12 away with by lying on these applications on the 4473s. 12:57:39  
13 He certainly falsified the 4473s after his release from 12:57:44  
14 confinement. 12:57:51

15 Q. Do you have any particular expertise in 12:57:52  
16 conditioning? 12:57:59

17 A. I have expertise in foreseeability, in assessing 12:58:04  
18 government practices and looking at the facts of this 12:58:10  
19 case. I am not a behavioral psychologist or a 12:58:12  
20 behavioral scientist, but my common sense and knowledge 12:58:16  
21 of the ways of the world that overlap from my area of 12:58:21  
22 expertise into others, I think can add value to the fact 12:58:24  
23 finder and to the parties. 12:58:28

24 Q. And we have established that Kelley may not 12:58:29  
25 have -- if he was not under indictment or the equivalent 12:58:34

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1 relates to the Air Force's duties to submit CHD to FBI. 13:03:30

2 MS. KRIEGER: I think we've got -- I think we are 13:03:37

3 about time to -- about time to take a lunch break. 13:03:39

4 THE WITNESS: Yes, ma'am. 13:03:43

5 MS. KRIEGER: So let's go off the record. 13:03:44

6 THE VIDEOGRAPHER: We are going off the record. 13:03:47

7 The time is 1:03. 13:03:49

8 (Recess from 1:03 p.m. to 1:41 p.m.) 13:03:58

9 THE VIDEOGRAPHER: We are now back on the record. 13:41:44

10 The time is 1:41. 13:41:46

11 BY MS. KRIEGER: 13:41:49

12 Q. Afternoon. Welcome back, Colonel Youngner. What 13:41:49

13 do you consider -- you started to say this earlier, but 13:41:56

14 what do you consider to be the subject matter of your 13:42:00

15 expertise in this case? 13:42:03

16 A. Good question. I was asked initially to review 13:42:05

17 the -- well, I was asked to review the DoD IG report 13:42:10

18 based -- and I think the reason -- I can't speak for 13:42:16

19 others. I can tell you what I understood my expertise, 13:42:20

20 then and now, to be. And that is to be an Air Force 13:42:24

21 officer and judge advocate who is experienced with DoD 13:42:30

22 and Air Force investigations, to include inspector 13:42:38

23 general investigations at DoD IG, and the SAC IG level, 13:42:46

24 down to installation level IGs. 13:42:53

25 Next is the familiar and an expert in the duties 13:42:57

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1 of the Air Force to comply with direction from higher 13:43:04  
2 headquarters', direction within the Air Force for 13:43:12  
3 compliance with congressional mandates, frankly statute. 13:43:15  
4 And then how DoD and the Air Force implement those 13:43:21  
5 higher headquarters' responsibilities. So what is the 13:43:26  
6 duty, is established. What is the promulgating 13:43:29  
7 instruction at DoD and subordinate to DoD by US Air 13:43:36  
8 Force and within US Air Force, in this case OSI and SF 13:43:42  
9 communities, as well as the judge advocates, and to 13:43:46  
10 provide expert opinion, if any opinion exists, on the 13:43:51  
11 DoD IG report and what consequence, if any, that had for 13:43:54  
12 ahead quarters Air Force, down to the Det level for OSI, 13:44:00  
13 headquarters Air Force down to the squadron level for 13:44:06  
14 security forces. And I think wrapped up -- I assess 13:44:10  
15 wrapped in that experience as a military attorney to 13:44:20  
16 look at the reasonableness of actions based on -- based 13:44:24  
17 on the facts of the case and the legal standards 13:44:32  
18 involved in a case, if you will. Foreseeability would 13:44:35  
19 be one of those issue s, and which is a legal issue. 13:44:39  
20 And then the facts, I think, speak for themselves as 13:44:44  
21 they relate back to these duties and whether or not 13:44:48  
22 there is increased risk of harm, whether or not the 13:44:52  
23 conduct is foreseeable or not. 13:44:55  
24 And we have already explored, as an example, one 13:44:56  
25 of the duties I thought did not exist was the duty of 13:45:02

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1 the staff judge advocate to report criminal history 13:45:07  
2 data. In fact, that is an opinion of mine. I do think 13:45:12  
3 it's responsibility the staff judge advocate to point 13:45:16  
4 out concerns that they identify to other Air Force 13:45:18  
5 personnel, kind of an agency, if you will, 13:45:23  
6 responsibility. But you can only report what you get 13:45:26  
7 seen or what you get exposed to. 13:45:29

8 Q. So -- 13:45:32

9 A. I hope that answers it. 13:45:34

10 Q. It does, very thoroughly. You stated that as you 13:45:35  
11 were -- one of the things you were asked to do as a 13:45:41  
12 military attorney was to assess, among other things, 13:45:44  
13 based on the facts of the case and the legal standards 13:45:48  
14 known to you, increased risk of harm, and 13:45:52  
15 foreseeability, and maybe some other legal issues; is 13:45:56  
16 that correct? 13:46:00

17 A. Well, I guess actually I wasn't asked to do. I 13:46:00  
18 was asked, what was the report? What were the duties 13:46:04  
19 and what were the consequences? And it was actually -- 13:46:06  
20 so I'm not parroting back. It was actually my opinion 13:46:10  
21 that there were consequences -- not that you were 13:46:15  
22 suggesting that, just to let you know. When I read 13:46:17  
23 through this the first time, my gut reaction was a bit 13:46:20  
24 of shock. Then I went back and said, okay. What is 13:46:24  
25 your role? What is your lane? You are an expert 13:46:26



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1 consultant. Assess this, good, bad or ugly, however  
2 this falls out. What do you think of this report? What  
3 are the consequences? What was implied as far as  
4 duties? If I apply a Texas tort law analysis and my  
5 analysis is what I read from Judge Rodriguez. I didn't  
6 know back and pull out the restatement and read tort  
7 law. I just looked at his definitions and applied those  
8 to the facts of the case.

13:46:30  
13:46:34  
13:46:36  
13:46:39  
13:46:44  
13:46:48  
13:46:52  
13:46:55

9 So I don't know if I wandered off on a tangent  
10 here and lose something, I want to make sure I'm  
11 answering your question.

13:46:57  
13:47:02  
13:47:04

12 Q. I think that was helpful. So when you were  
13 assessing the consequences, you were -- of the Air  
14 Force's actions, you were applying Texas tort law based  
15 on Judge Rodriguez's opinions that he wrote in this  
16 case? Is that correct?

13:47:05  
13:47:09  
13:47:15  
13:47:18  
13:47:24

17 A. Whatever I had in his opinions at the time; so  
18 some of these have become more refined because in March  
19 of last year, I didn't have, I think the motion for  
20 summary judgment. And I didn't have, I guess the  
21 Daubert motion on Webster. But I did have his opinion.  
22 I think it was an initial motion to dismiss when the  
23 cases were consolidated. And it laid out the  
24 foundations for negligent undertaking as a duty. I  
25 think it was the Phillips factors. I don't have the

13:47:25  
13:47:31  
13:47:34  
13:47:39  
13:47:43  
13:47:50  
13:47:54  
13:47:57  
13:48:06

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1 case in front of me. But laid out the factors to  
2 consider, and that there was a duty -- and it also  
3 eliminated certain duties. There were certain things  
4 that the Air Force could not be held responsible for.

13:48:09

13:48:11

13:48:14

13:48:17

5 So I did read the law, applying my legal

13:48:21

6 experience to it. But in the context really of looking

13:48:26

7 at it as what -- because part of understanding Air Force

13:48:30

8 duties, we have -- unlike the civilian world, there

13:48:36

9 isn't a Title 18 equivalent for dereliction of duty. It

13:48:40

10 is -- someone that IBM can't be convicted of not doing

13:48:44

11 their job well. And someone, even if you can be

13:48:48

12 censured or reprimanded under labor law and federal

13:48:52

13 employment law, but you can't be criminally convicted

13:48:56

14 for dereliction of duty. And dereliction of duty, to

13:49:00

15 include a duty to submit required reports, is a triable

13:49:04

16 criminal offense in a military code of justice. So I

13:49:08

17 think that partially what -- I'm speculating as to why

13:49:11

18 Plaintiff's Counsel wanted to hire me on this, but my

13:49:15

19 assessment, what I brought to the table was an

13:49:18

20 understanding of how the military, in particular the Air

13:49:22

21 Force and IGs, look at duty, and then help them form

13:49:28

22 their judgment after I write an opinion that either

13:49:36

23 party can use.

13:49:39

24 Q. So when you were writing the consequences section

13:49:40

25 of your initial report, and also then when you were

13:49:45

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1 writing portions your supplemental report, you were  
2 applying the law as it's set out by Judge Rodriguez in  
3 his opinions, to the facts of the case as you know, as  
4 you set out the facts that you laid out in other parts  
5 of your report?

13:49:49

13:49:55

13:50:02

13:50:07

13:50:10

6 A. Well, to the best of my ability, I don't want to  
7 step on the province of the finder of fact once they say  
8 this is. I think he wrote proximate cause has two  
9 elements, cause and fact and foreseeability, kind of  
10 flashbacks of law school. So I -- it was easy to kind  
11 of track that nightmare. But anyway, track back to  
12 those legal standards, if you will. And the -- so what  
13 I did was I guess straightforward somewhat, what did I  
14 see were consequences of a duty that I assess the six  
15 duties. It's clear to me from reading his last opinion  
16 that he's not really interested in training, though I  
17 think that's supervisory responsibility. So I applied  
18 the facts of the case to the laws I understood it. But

13:50:11

13:50:15

13:50:18

13:50:25

13:50:30

13:50:33

13:50:41

13:50:48

13:50:53

13:50:58

13:51:02

13:51:05

13:51:10

19 the DoD IG report that I started with, I actually  
20 started with the '18 report and then realized there's a  
21 lot more here. So then I went back and went from '97  
22 and read the reports moving forward and then read the  
23 DoD IG report of '18 again. And that helped me look at  
24 okay, as a framework, conceptually, let's look at the  
25 DoD IG analysis of this, and do I agree or disagree?

13:51:15

13:51:20

13:51:23

13:51:26

13:51:30

13:51:36

13:51:40

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1 me ask it a different way. 14:21:25

2 A. Sure. 14:21:26

3 Q. Do you recall at any of your SJA positions, 14:21:27

4 advising OSI or security forces on fingerprints or the 14:21:36

5 submission of criminal history data? 14:21:40

6 A. I do not. I never had that duty. And it gets 14:21:43

7 back to the roles and missions that are in the AFIs that 14:21:46

8 we talked about earlier. And the SJA has the role to -- 14:21:52

9 and I will tell you, so first of all, no; I did not. I 14:21:56

10 had aware of change -- as I was about to retire, we 14:22:00

11 focused very aggressively on combatting sexual assault 14:22:04

12 in the military. And the Air Force led the services on 14:22:09

13 special victim counsel and on victim's advocacy rights. 14:22:13

14 I've actually been a victim's advocate in my private 14:22:18

15 practice now on a couple occasions. And there are much 14:22:22

16 better checklists and systems in place to make sure 14:22:26

17 victims are advised, not just sexual assault victims. 14:22:30

18 So I'm aware, since I retired, that the Air Force -- so 14:22:35

19 from 2014 to date, that there are more requirements in 14:22:37

20 51-201 and in matters that are submitted in AFI 41-201, 14:22:42

21 administration of military justice, as well as post 14:22:52

22 conviction notifications as a result of increased 14:22:54

23 awareness of victims's rights, both in general and in 14:22:58

24 sexual assault cases in particular. 14:23:03

25 Q. In your SJA positions, were you ever aware of 14:23:05

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1 that OSI used to talk about, that's interesting, but it 14:39:33  
2 gets in the way of prosecuting the cases that you know 14:39:37  
3 have got to go to trial or the cases you've got to 14:39:41  
4 develop. 14:39:44

5 So I think a light caseload is four. I think a 14:39:45  
6 heavy caseload is, with all aspects, north of eight for 14:39:49  
7 any particular agent. And realizing they will buddy up, 14:39:57  
8 one will be taking notes while the other one is doing 14:40:01  
9 the interview. The other one types up the 1168. But to 14:40:04  
10 be a lead agent, to be the -- if you will, investigative 14:40:09  
11 lead. 14:40:13

12 Q. In your active duty positions, did you regularly 14:40:14  
13 use the AFOSI Manual 71-121? 14:40:24

14 A. No. I did not. In fact, it is pulling teeth 14:40:29  
15 sometimes to get OSI to release their investigative 14:40:37  
16 manuals. My Bible was the manual for court-martial, 14:40:41  
17 first and foremost, then 51-201 as a judge advocate. So 14:40:45  
18 I apologize for the religious references. My guide was 14:40:51  
19 the 51-201 and the assorted checklists that we had. 14:40:55

20 But even as a defense counsel, I would want to 14:40:59  
21 argue, I would get discovery of an OSI agent's prior 14:41:04  
22 disciplinary history. And if I found they had committed 14:41:10  
23 a mendacity offense, I could try to impeach their 14:41:14  
24 testimony because they lied about something and received 14:41:19  
25 Article 15 on it. I was lucky to do that. Usually when 14:41:23

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1 I went to the judge and filed a motion to compel 14:41:26  
2 discovery. Getting OSI to give you their checklist or 14:41:29  
3 to give you the case file, usually on the defense side 14:41:33  
4 at the bar, required me to file a motion to compel 14:41:36  
5 discovery. The as a prosecutor, it was -- well, you 14:41:39  
6 really want to see the case file? Sure. I remember 14:41:46  
7 this plain as day on my first couple cases. JAGs don't 14:41:50  
8 usually ask us for that. So getting the case file, much 14:41:55  
9 less the instructions or the checklists that are 14:41:59  
10 supposed to follow, OSI was, in my assessment, based on 14:42:01  
11 my experience in the Air Force for 25 years, loathed to 14:42:07  
12 provide those documents to anybody other than OSI 14:42:10  
13 agents. 14:42:14

14 Q. So based on what you just said, fair to say that 14:42:14  
15 when you were on active duty, you did not regularly 14:42:17  
16 access any of the OSI instructions or guidelines or 14:42:22  
17 checklists or anything like that? 14:42:28

18 A. That is fair. 14:42:30

19 Q. Is it also true of the security forces 14:42:31  
20 instructions when you were on active duty? Were you 14:42:38  
21 able to regularly access the security forces 14:42:40  
22 instructions? 14:42:45

23 A. Actually, yes, I was able to regularly access the 14:42:45  
24 security forces instructions. I could go to the e-pub's 14:42:50  
25 website and get to those. They weren't restricted 14:42:55

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1 access items. And often an SFOI NCO would include the  
2 checklist with the materials that we would receive from  
3 them on a case file. My experience, the SF regulations  
4 and/or checklists were much more accessible to the judge  
5 advocates on the case. And I looked at them.

14:43:00

14:43:05

14:43:08

14:43:13

14:43:16

6 I recall early on in my career as a supervisor, I  
7 didn't have need, typically, to do that as an SJA. It  
8 was more as a trial counsel and defense counsel.

14:43:19

14:43:23

14:43:28

9 Q. So it sounds like when you water trial counsel  
10 and defense counsel, at that point in time you would  
11 have been familiar with the -- more familiar with the  
12 security forces instructions than your were later?

14:43:30

14:43:33

14:43:36

14:43:39

13 A. I would say I was still generally familiar. I  
14 just didn't have a need to go -- in my role advising the  
15 commander on disposition of a case, or of how to conduct  
16 the case, there just wasn't a need for me to, in most  
17 instances, unless there was an issue on -- I would get  
18 into it on issues of, say a probable cause search and  
19 seizure. And that point, I would be able to access even  
20 the OSI records when it was specifically relevant to the  
21 issue at trial. Then I recall one of those arguments  
22 was we had to see the wing commander and OSI involved  
23 having access to records that we need to make sure this  
24 is done properly. But it did not involve fingerprints.

14:43:45

14:43:49

14:43:53

14:43:58

14:44:03

14:44:07

14:44:13

14:44:17

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14:44:30

14:44:32

25 Q. While you were on active duty, you mentioned that

14:44:37

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1 look over my case list real quick? 14:48:42

2 Q. Sure. 14:48:44

3 A. Do you mind repeating the question? Because I 14:48:55  
4 may have a case out of Keisler involving an alleged 14:48:57  
5 rape. But his did not -- the use of weapons in that 14:49:02  
6 case, I don't believe -- so what was the question one 14:49:06  
7 more time? 14:49:09

8 Q. Sure. My question was, have you ever worked on a 14:49:09  
9 case that involved a person who was prohibited from 14:49:13  
10 purchasing firearms, who nonetheless had been able to 14:49:18  
11 purchase firearms? 14:49:22

12 A. My first answer is no. I have not. Let me just 14:49:27  
13 quickly look through and see if there are any others in 14:49:33  
14 here. No. I have not, to the best of my recollection. 14:49:37

15 Q. In developing the opinions that you made in your 14:49:47  
16 -- in both of your reports, did you speak with anyone 14:49:52  
17 other than Counsel in this case? 14:49:55

18 A. No. I did not. And if I may, let me know when 14:49:58  
19 it's an appropriate time to take a break. 14:50:03

20 Q. I'm just -- absolutely. I'm just finishing this 14:50:05  
21 up. 14:50:10

22 A. Okay. 14:50:10

23 Q. Once I finish up this, in the next five minutes. 14:50:11  
24 So you did not -- the only person that you spoke with as 14:50:16  
25 part of development of your opinions in this case was 14:50:20



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1 Counsel; correct? 14:50:24

2 A. Counsel for Plaintiffs; that is correct. 14:50:24

3 Q. Okay. You didn't speak with anyone from the 14:50:26

4 Department of Defense or Air Force? 14:50:30

5 A. I don't recall speaking to anybody else about 14:50:32

6 this case. 14:50:35

7 MS. KRIEGER: Okay. Let's take a five-minute 14:50:36

8 break then. 14:50:38

9 THE WITNESS: Thank you. 14:50:39

10 THE VIDEOGRAPHER: We're going off the record. 14:50:40

11 The time is 2:50. 14:50:41

12 (Recess from 2:50 p.m. to 3:00 p.m.) 14:50:42

13 THE VIDEOGRAPHER: We are now back on the record. 15:00:45

14 The time is 3:00 p.m. 15:00:46

15 BY MS. KRIEGER: 15:00:50

16 Q. One more thing that I had about the previous -- 15:00:50

17 the previous topics about your experiences. 15:00:54

18 A. Yes, ma'am. 15:00:58

19 Q. When you were on active duty, how familiar were 15:00:59

20 you with the DoD Instruction 5505.11? 15:01:02

21 A. The -- I was generally aware that it existed. I 15:01:08

22 would not call myself extremely familiar with it when I 15:01:15

23 was on active duty. I've obviously had an opportunity 15:01:20

24 to become much more familiar with it as expert on this 15:01:23

25 case. 15:01:27

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1 Q. I think that is true for all of us. 15:01:29

2 A. I was aware of DIBRS and the reporting 15:01:32  
3 requirements there, and the Volume 1 and Volume 2. And 15:01:36  
4 I generally -- I would say probably became more aware of 15:01:42  
5 it in the timeframe of my assignment at Seymour Johnson. 15:01:47  
6 I'm just -- that was 2003 to 2005. I'm wondering why I 15:02:01  
7 think that as opposed to when I was at Rhein-Main, but 15:02:14  
8 anyway, that was the best of my recollection. 15:02:18

9 Q. Prior to being retained in this case, how 15:02:20  
10 familiar were you with the Brady Handgun Violence 15:02:25  
11 Prevention Act? 15:02:30

12 A. Fairly familiar -- actually, you said Brady. 15:02:30  
13 Lautenberg, I knew a lot more about. I generally knew 15:02:37  
14 about categories, I don't think I knew 10 specific 15:02:40  
15 categories of disqualified persons or such. But so I 15:02:44  
16 had some familiarity with the Brady Gun Control Act and 15:02:50  
17 with its predecessor or with the Gun Control Act of '68, 15:02:59  
18 if I have that right. So I hope that answers your 15:03:05  
19 question. 15:03:09

20 Q. How -- why -- you say you were somewhat familiar 15:03:09  
21 with it. Why were you somewhat familiar with it? 15:03:14

22 A. Well, so I mean, I just generally remember the 15:03:17  
23 Brady Gun Control Act being passed, and I remember 15:03:29  
24 President Reagan's shooting and there was legislative 15:03:34  
25 response for gun control and series of gun control 15:03:38

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1 legislation. At one point I was an NRA member. I am  
2 not currently. I possess and believe in safely using  
3 weapons that I shoot for sport or hunting. With  
4 military, my very first assignment at the 101st Airborne  
5 Division as an ambulance platoon leader, one of my  
6 troops, literally the weekend I got there, engaged in a  
7 serious criminal offense and was locked up in the  
8 Clarksville, Tennessee jail, later escaped from it and  
9 got shot. And that was -- that goes back a ways. That  
10 was 1986, '87 timeframe. So I have been aware of it. I  
11 would imagine it came up during the course of -- I'm  
12 trying to think of particular cases I did that might  
13 have involved weapons, or the types of threats that  
14 people posed. I guess I can just say I have a general  
15 knowledge of it, somewhat incident to my duties, but I  
16 can't recall. I did not prosecute any case involving  
17 someone who I can recall who obtained a weapon who was  
18 disqualified from having one.

19 Q. You said you were more familiar with the  
20 Lautenberg Amendment. Why were you more familiar with  
21 that?

22 A. Maybe this relates back to the Brady Gun Control  
23 Act. So when you become a judge advocate, you go  
24 through a judge advocate staff officer course. Then we  
25 get annual updates on the law. So there's a military

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1 continuing legal education program in addition to your  
2 state bar's continuing education program. We also, in  
3 the Air Force, have a mid-career course and I would go  
4 do criminal law development at JAG school, a program in  
5 Charlottesville. There was an entire year block of  
6 instruction on military justice and military law as part  
7 of that. So undoubtedly, I was taught about these  
8 factors, particularly Lautenberg Amendment, because -- I  
9 had two specialty areas also in my career. And that was  
10 military criminal matters, which involved into  
11 leadership, and operations law. And international and  
12 operations law, part of that is being able to deploy,  
13 deploy down range, and that includes having to have a  
14 firearm. And domestic violence and the impact of  
15 domestic violence on readiness is something that was an  
16 issue throughout my career, particularly the last half  
17 of my career.

18 Even on the point where we would discuss from the  
19 recruiting level, and this actually relates to a non-JAG  
20 role with the developing airspace leaders program. Are  
21 we attracting and retaining the right kind of talent?  
22 No offense to our sister services, but the academic  
23 scores in the Air Force are higher. As a matter of  
24 fact, of the other service records, the data backs that  
25 up. So their military aptitude batteries come back at a

15:05:23

15:05:28

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15:05:37

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15:05:44

15:05:47

15:05:56

15:06:05

15:06:08

15:06:13

15:06:16

15:06:19

15:06:23

15:06:27

15:06:32

15:06:35

15:06:37

15:06:40

15:06:43

15:06:48

15:06:53

15:06:57

15:06:59

15:07:02

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1 higher level. And the question is, do we -- there was a  
2 question during a manpower downfall, do we lower  
3 standards to attract people, yet have to deal with  
4 waivers for moral concerns or firearm possession. So it  
5 has come up in the course of my career in several  
6 different ways. That's why I would have a familiarity  
7 with a the Lautenberg Amendment, as well as the Brady  
8 Gun Control Act.

15:07:07

15:07:10

15:07:14

15:07:19

15:07:23

15:07:27

15:07:30

15:07:36

9 Q. Is it fair to say that you are now quite familiar  
10 with the Brady Act and Lautenberg Amendment?

15:07:36

15:07:42

11 A. Much more familiar than I was before I was  
12 retained to advise on this case.

15:07:46

15:07:49

13 Q. How did you become -- how did you improve your  
14 familiarity with these laws?

15:07:51

15:07:55

15 A. I read -- I read through the reports. I mean,  
16 there's -- so every one of the DoD IG reports, I'm  
17 almost positive, give you the legislative history. So  
18 it is just another layer, as you go through them, as to  
19 what's happening. And my radar is now attuned to the  
20 issues. So I haven't researched it on purpose, but I  
21 think there was like a NICS Improvement Act or something  
22 like that, either '18, '19 or '20. So now I've kind of  
23 got my radar. The spidey sense tingles when I hear  
24 things like "NICS" or "background checks," so -- but to  
25 answer your question, again, reading the depositions and

15:07:59

15:08:02

15:08:06

15:08:10

15:08:15

15:08:18

15:08:21

15:08:25

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15:08:34

15:08:38

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1 the discovery, you read through Ms. Del Greco's 15:08:43  
2 deposition and you read the she had a PowerPoint exhibit 15:08:47  
3 of 40-something slides that breaks down everything that 15:08:50  
4 happens. Then there is the ATF agents who talk about 15:08:54  
5 what they do. Anyway, so I would say just in doing my 15:08:57  
6 due diligence to read all this material and provide an 15:09:06  
7 opinion, is how I most become informed. 15:09:09

8 Q. And you just mentioned Kim Del Greco and her NICS 15:09:12  
9 PowerPoint. Prior to being retained in this case, how 15:09:17  
10 familiar were you with the National Instant Criminal 15:09:20  
11 Background Check System, which for some reason is 15:09:26  
12 abbreviated as NICS? 15:09:29

13 A. I have purchased weapons and filled out a 4473 15:09:32  
14 from an FFL. And so as a result, I'm completely 15:09:36  
15 familiar, having done it on those forms. So that's my 15:09:42  
16 familiarity. I own an AR. I own a 0.45 caliber pistol. 15:09:49  
17 I own a shotgun. My wife has a 0.50 caliber Beowulf. 15:09:56  
18 We are responsible gun owners. We lock them and trigger 15:10:04  
19 lock them. And anyway, that's enough about that. 15:10:10

20 Q. So other than your experience with NICS when 15:10:12  
21 buying firearms yourself, is all of your familiarity 15:10:18  
22 with the NICS system based on the documents and 15:10:21  
23 testimony that were provided to you in this case? 15:10:24

24 A. That and my experience, that's correct, just my 15:10:27  
25 personal weapon purchasing experience. 15:10:31

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1 was another state, and we coordinated it with their 15:14:30  
2 local law enforcement to then forward that to the FBI, 15:14:33  
3 to make sure they corrected his data so that he would no 15:14:36  
4 longer be listed as a disqualified person. And that 15:14:40  
5 case is Williams, Shelby Williams, if you want to know 15:14:45  
6 who it was. It is one of the listed cases. It's been 15:14:50  
7 since I retired. 15:14:54

8 Q. How familiar are you with gun control laws in 15:14:55  
9 Texas? 15:15:00

10 A. Only with what I've read about in this case; so I 15:15:00  
11 would not -- I would not say I am -- I'm not Barred in 15:15:07  
12 Texas and I would not offer opinions on Texas law, 15:15:15  
13 though if we wanted to talk about on Texas firearm law, 15:15:17  
14 let me put it that way, I am very comfortable assessing 15:15:23  
15 constructs such as tort law foreseeability and so forth 15:15:27  
16 as defined by a judge, but not substituting a legal 15:15:30  
17 opinion for a judge's opinion; I would not dare to do 15:15:35  
18 that. 15:15:39

19 That was a long way of saying I am not a Texas 15:15:39  
20 lawyer and I only have familiarity with Texas gun law 15:15:47  
21 that has been presented to me on this case. 15:15:57

22 Q. Do you know if Texas has any gun control laws 15:15:59  
23 that goes beyond what the federal law requires? 15:16:02

24 A. My -- in answering your question, I'm not sure 15:16:11  
25 what "go beyond" -- let me tell you what I am aware of, 15:16:22

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1 A. Let me get my notes. Page 78. Okay. 16:24:30

2 Q. Here you say, "As a result of the multiple Air 16:24:38  
3 Force failures to report CHD, the Air Force conditioned 16:24:42  
4 Kelley to expect to be able to purchase the high 16:24:45  
5 quality, new reliable firearms directly from an FFL 16:24:48  
6 dealer." Did I read that directly? 16:24:52

7 A. You did. 16:24:55

8 Q. We spent a lot of time on this subject before. 16:24:55  
9 So is your definition of conditioning here the same as 16:24:59  
10 it was in your previous report? 16:24:59

11 A. It is. And I also, as previously discussed in 16:25:09  
12 the other report, defer to a definition of the 4473, I 16:25:11  
13 think Line 11 Bravo on the form as to whether the 16:25:16  
14 information indictment, did he lie on those first two 16:25:22  
15 forms or not? I know that Texas Ranger testified, I got 16:25:26  
16 that snippet in there. But the qualification I gave 16:25:29  
17 prior to this about the distinction between a deferral 16:25:41  
18 versus a denial comes into play. But my definition 16:25:45  
19 still remains the same as far as conditioning. 16:25:49

20 Q. And your understanding of what conditioning 16:25:51  
21 means, in your basis for determining that he was 16:25:56  
22 conditioned, that's the same as we discussed previously; 16:26:00  
23 correct? 16:26:03

24 A. To be clear, it is the same and I included my 16:26:06  
25 assessment of the opinions provided by Dr. Bursztajn and 16:26:09



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1 Dr. Webster to help build my knowledge in expressing  
2 that opinion.

16:26:16

16:26:20

3 Q. But in essence, it's -- the basis for your  
4 opinion is your common sense experience, your common  
5 sense knowledge of conditioning, combined with your  
6 knowledge of the facts and laws and regulations of this  
7 case?

16:26:21

16:26:25

16:26:32

16:26:35

16:26:41

8 A. I think that's fair, yes.

16:26:42

9 Q. So let's turn to Page 27. We are on Page 27.

16:26:43

10 I'm sorry. Let's turn to Page 27 of the report. We are  
11 Bates 27. Paragraph 81, and here you state, "With the  
12 evidence also pointing to Devin Kelley's strong  
13 preference for only his guns and new guns, more likely  
14 and common sense outcomes are indicated."

16:26:58

16:27:03

16:27:11

16:27:15

16:27:18

15 A. Yes.

16:27:21

16 Q. What do you mean by "common sense outcomes"?

16:27:22

17 A. To be clear, the fact finder on a case is going  
18 to look at -- I'm not trying to be cute here. I want to  
19 explain this answer in fairness to all the parties. I  
20 read Judge Rodriguez's opinion about the boundaries of  
21 expert testimony as it related to Dr. Webster. And I  
22 came back to this and thought, okay. Let's think about  
23 what your basis of opinions are. And to me, it is both  
24 based on my professional experience as a military  
25 officer and as a judge advocate. But also, if he agrees

16:27:22

16:27:44

16:27:46

16:27:49

16:27:54

16:27:59

16:28:02

16:28:10

16:28:14

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1 with my -- my interpretation of these facts and what the 16:28:21  
2 consequences are, then I think it's a common sense 16:28:26  
3 outcome. In other words, just common sense would 16:28:29  
4 dictate that somebody who is continually -- so it's a -- 16:28:33  
5 you said before, counterfactuals abound. And you can 16:28:37  
6 look at this, whether it's a counterfactual or a fact, 16:28:41  
7 what are the facts of this case? We have, I assess, an 16:28:48  
8 expressed opinion, strong opinion by Devin Kelley, by 16:28:52  
9 those who knew him, for new guns and guns he could 16:28:57  
10 procure from an FFL dealer. So therefore it's more 16:29:01  
11 likely than not, and common sense interpretation of 16:29:05  
12 those facts and the laws that operate, that he would 16:29:09  
13 have been denied a point of sale inquiry on his last 16:29:13  
14 four weapons. He would have been delayed on the first 16:29:19  
15 two, because of his history. It would make sense for 16:29:22  
16 him to be investigated by ATF. ATF, I think in previous 16:29:22  
17 testimony, reports a heightened awareness for weaponry 16:29:39  
18 possession on domestic violence cases. If this was just 16:29:42  
19 a bad check by that went to get a gun like your 16:29:44  
20 hypothetical before, all that ATF could investigate -- 16:29:49  
21 when I read that GAO report, it was investigated at 16:29:53  
22 state level and ATF level. I am highly confident that 16:29:57  
23 they would have gone to knock on his door because of his 16:30:01  
24 domestic violence history. Common sense would dictate 16:30:04  
25 that. And the facts of what ATF has already testified 16:30:08

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1 to and others have testified to in the studies that

16:30:12

2 we're relying on. I mean, I don't know if you want me

16:30:14

3 to go through each of these, but...

16:30:18

4 Q. I'll -- I'm sorry. I didn't mean to interrupt  
5 you. Let me ask you question about each of them. That  
6 will just make the record mere clear.

16:30:20

16:30:24

16:30:27

7 So I think you just stated your basis for  
8 believing that he would be investigated by ATF. I took  
9 this down but you have the report in front of you.

16:30:37

16:30:37

16:30:39

10 A. Yes, ma'am.

16:30:41

11 Q. So the next question, the next opinion is he  
12 would have been prosecuted for federal and/or state  
13 firearms related violations after attempting to purchase  
14 firearms, including falsifying the 4473. What is the  
15 basis for your belief that Kelley would have been  
16 prosecuted?

16:30:41

16:30:48

16:30:51

16:30:55

16:31:05

16:31:07

17 A. The fact that Texas -- well, there are several  
18 bases. One, had he been entered -- had his criminal  
19 history data been entered into NICS, not just once, but  
20 each time, you would have two final disposition reports  
21 and four sets of fingerprint cards, or at least one from  
22 OSI and one from security forces on the fingerprint  
23 cards. And you would have two FDRs. So you definitely  
24 have data at NICS that if FBI would have, showing the  
25 final disposition of his case for domestic violence and

16:31:08

16:31:14

16:31:19

16:31:23

16:31:25

16:31:30

16:31:34

16:31:37

16:31:41

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1 Q. But assuming that he had been denied and somehow 16:38:45  
2 had a firearm anyway, perhaps from a friend or 16:38:51  
3 something, do you -- do you have any reason think that 16:38:55  
4 Kelley would have told law enforcement that he had a gun 16:38:58  
5 on him? 16:39:03

6 A. I don't have any reason to think that he would or 16:39:04  
7 wouldn't. I -- in looking at his conduct, he seems a 16:39:06  
8 little cocky. He seems a little bold, the way he talks. 16:39:10  
9 I wouldn't put it past Devin Kelley to be dumb enough to 16:39:15  
10 know he's been denied and still tell a cop, hey, I'm 16:39:20  
11 packing a gun. I think it is consistent for him to brag 16:39:24  
12 about it. And because he is, pardon my expression, a 16:39:30  
13 bad ass. 16:39:33

14 Q. Have you ever worked -- 16:39:33

15 A. With this gang, anyway. 16:39:35

16 Q. Have you ever worked with ATF? 16:39:39

17 A. No. I have not worked -- I'm trying to think of 16:39:47  
18 when I have attended training and education with ATF 16:39:49  
19 agents, but I have not worked with ATF. No. I have 16:39:53  
20 not. 16:39:57

21 Q. So now I'm looking at subparagraph -- let's -- we 16:39:57  
22 can kind of take them, I think in chunks here. The -- 16:40:05  
23 so let's start with Subparagraphs E, F and I, and that 16:40:12  
24 he would not have bought at a gun show, would not have 16:40:19  
25 bought online, would not have manufactured a firearm or 16:40:23

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1 ghost gun. I want to clarify something. When you are  
2 coming to these conclusions, do these build on each  
3 other? Are you saying here that if he had been denied  
4 and investigated and prosecuted, he would not have  
5 bought at a gun show?

16:40:31

16:40:34

16:40:37

16:40:42

16:40:45

6 A. That's a good question. Actually, I think these  
7 are serial, not building, if you will. I hate to say  
8 like a spiral development, but any one of these -- if  
9 you had just reported him once with the fingerprints,  
10 that could have been enough to get him entered. If you  
11 had just denied him once, it could have been enough. It  
12 certainly aggravates it that it happened all these other  
13 times to condition him even more. So since we have  
14 entertained counterfactuals about the case, I would just  
15 tell you, it is my opinion that he wouldn't have done  
16 one then the other. I think he's demonstrated a very  
17 strong preference for weapons from an FFL dealer. So I  
18 don't think if -- and I guess the best example for this  
19 for me is, he tried to get one from Dick's. When that  
20 didn't work, he went to Academy. So he didn't turn to a  
21 gun show. He didn't turn to -- he went to them, but he  
22 never bought one. So the facts are he didn't buy a gun  
23 ever at a gun show. The facts are he never bought a  
24 firearm online. And he, I guess we have to explore this  
25 shotgun and how he arranged to get that. But I don't

16:40:46

16:40:50

16:40:55

16:40:59

16:41:02

16:41:06

16:41:11

16:41:16

16:41:20

16:41:23

16:41:29

16:41:32

16:41:36

16:41:40

16:41:43

16:41:49

16:41:53

16:41:57

16:42:00

16:42:06

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1 know anybody has really narrowed that down. He didn't 16:42:10  
2 ask anybody to loan him -- I'm sorry. You want to talk 16:42:14  
3 to the ones you have. 16:42:16  
4 He didn't research how to build a ghost gun nor 16:42:18  
5 talk about a ghost gun, but he did talk about how great 16:42:22  
6 this AR is, and Dad, you need to get one, too. So he 16:42:26  
7 was very expressive about high quality weapons. 16:42:30  
8 According to Danielle Smith, he studied the weights of 16:42:37  
9 the weapons, the rounds, the loads, the specs or 16:42:40  
10 specifications. And so he seemed to be a bit of a high 16:42:44  
11 quality firearm aficionado. That was his thing. 16:42:48  
12 Why he didn't turn to these others, it doesn't -- 16:42:56  
13 what he did in fact did or didn't research. He didn't 16:43:00  
14 research ghost guns. He didn't try to followup to try 16:43:04  
15 to get these things. 16:43:07  
16 Q. So your basis for those three statements, E, F 16:43:08  
17 and I, are that that's consistent with the behavior that 16:43:13  
18 he, in fact, showed. He never did buy at a gun show, he 16:43:19  
19 never did buy -- well, unclear about online. And he 16:43:23  
20 never manufactured a ghost gun. Is that fair? 16:43:26  
21 A. Not completely. It is consistent with his 16:43:30  
22 behavior. That's fair. But it is also consistent with 16:43:33  
23 the testimony of other deponents. And it's consistent 16:43:36  
24 with the facts of what he actually did do in purchasing 16:43:43  
25 FFL dealer weapons. 16:43:47

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1 Q. Okay. And now the Subparagraphs G and H, and I  
2 separated those out because they both require the  
3 actions of someone else to have been involved. He would  
4 not have successfully borrowed a firearm. He would not  
5 have obtained a firearm by proxy. What is your basis  
6 for saying those?

16:43:48

16:43:56

16:44:01

16:44:04

16:44:07

16:44:09

7 A. The basis for saying those are that his desire  
8 for, as evidenced by his conduct, the FFL dealer  
9 procured weapon; the fact that he liked having his own  
10 weapon. As your expert Mr. Barborini talked about, he  
11 liked to modify it. He added on a lot of things to the  
12 AR, in particular, to custom kit it out, if you will, to  
13 his particular aficionado specifications. He never, in  
14 fact, did borrow from his father. He -- others had  
15 testified they wouldn't have loaned him one. He may  
16 have tried, but there is no evidence in the record that  
17 I reviewed of him ever trying to borrow a weapon. And  
18 in fact, he didn't have to because he was able to  
19 purchase high quality firearms from FFLs, even though he  
20 should have been disqualified. Those altogether form  
21 the basis of -- other deponents' testimony, it's his  
22 actual conduct in fact.

16:44:11

16:44:17

16:44:23

16:44:27

16:44:32

16:44:36

16:44:40

16:44:46

16:44:51

16:44:55

16:44:57

16:45:02

16:45:04

16:45:09

16:45:12

16:45:16

23 And again, I build in the counterfactual. It's a  
24 more likely outcome that had the criminal history data  
25 been submitted, this wouldn't -- he wouldn't have

16:45:18

16:45:26

16:45:31

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1 pursued these. He didn't like anything but FFL procured  
2 weapons.

16:45:35

16:45:39

3 Q. To be clear, all of your conclusions here are  
4 based on your review of the depositions and documents  
5 that have been produced in this case?

16:45:40

16:45:44

16:45:49

6 A. And to include the experts' opinions as well on  
7 both sides.

16:45:51

16:45:55

8 Q. Are you aware of any research or literature  
9 regarding where mass shooters obtain their weapons?

16:45:56

16:46:31

10 A. Immediately, I'm trying to remember if Barborini  
11 talked about that. All I know is that on the facts of  
12 this research, the experts may have had something to say  
13 about that. I just know the facts of this case is Devin  
14 Kelley, as a mass shooter, obtained his from FFL dealers  
15 after the Air Force failed to submit his criminal  
16 history data.

16:46:38

16:46:45

16:46:49

16:46:53

16:46:58

16:47:02

16:47:06

17 Q. Are you aware of any research that examines where  
18 people in Texas, in general, obtain their weapons?

16:47:07

16:47:10

19 A. I remember reading somewhere in a deposition  
20 that, words to the effect of, "this is Texas and  
21 everybody has guns." I think that the -- so research, I  
22 it may have been Barborini again who talked about the  
23 common availability of firearms. But the relevance is  
24 back to, it's an interesting question for both parties,  
25 what do we know about this particular shooter and Devin

16:47:15

16:47:18

16:47:21

16:47:30

16:47:35

16:47:38

16:47:42



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1 own? I know you mentioned this before. 17:02:17

2 A. I qualified -- so when I was in the Army, I fired 17:02:20  
3 all the basic weapon systems at Fort Bragg over a 17:02:24  
4 six-week period from the M1 A1, Abrams tank, down to the 17:02:30  
5 45 caliber pistol, the law, the 105 millimeter Alistair, 17:02:33  
6 so forth. I qualified with grenades. I qualified 17:02:39  
7 expert M16 at that time before I deployed to Iraq. I 17:02:43  
8 qualified expert on the M4, the updated version with the 17:02:46  
9 collapsable stock. So I'm actually recognized -- should 17:02:51  
10 be on DD form 214, my expert weapon qualification on the 17:02:55  
11 M4, the M16, and then I also qualified expert with the 17:03:01  
12 38 pistol at one point in my career. I have 17:03:05  
13 familiarization fired the M60, several other weapons. 17:03:09  
14 So I am not going to call myself a weapons expert, but I 17:03:16  
15 have qualified as an expert soldier and airman using 17:03:21  
16 some of the basic weapons, including one variant of what 17:03:26  
17 was used in this case. 17:03:29

18 Q. Do you have any expertise in firearm sales or 17:03:31  
19 trafficking? 17:03:36

20 A. No. I do not. I just have experience from 17:03:36  
21 having purchased a weapon and filled out the ATF forms. 17:03:42

22 Q. Do you have expertise in firearm safety? 17:03:47

23 A. Yes, I do. I was a range safety officer for 17:03:50  
24 several years at Fort Detrick, Maryland. I was a range 17:03:55  
25 safety officer at Andrews Air Force Base. I would run 17:03:59

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1 is he appears to be a very well qualified expert, as  
2 does Dr. Webster.

3 Q. Do you have any expertise in forensic psychiatry?

4 A. I have -- my only expertise in forensic  
5 psychiatry has been in the course of my duties as trial  
6 counsel or defense counsel. I do have extensive  
7 experience working with forensic psychiatrists and  
8 psychologists. I have attended some forensic training  
9 in that regard, but as a military counsel, defense or  
10 trial. So I am not a -- I have no specialized training  
11 or experience in forensic psychology. All that relates  
12 to the criminal, basically to the litigation process in  
13 direct examining, cross-examining scientific experts and  
14 so forth.

15 Q. And you dispute in these -- in Paragraph 91, Dr.  
16 Bursztajn's conclusion that it was not foreseeable to  
17 the Air Force that Kelley would commit a crime of mass  
18 violence such as the shooting on November 5th; is that  
19 correct?

20 A. That's -- I do because it's in my wheelhouse to  
21 discuss the legal terms of foreseeability. And as I  
22 understand the Texas law and frankly, I form that  
23 opinion based on my knowledge, experience and  
24 understanding of Texas tort law and the Federal Tort  
25 Claims Act, but particularly in this case you have to

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1 apply Texas law to the case at bar.

17:31:56

2 Q. Do you -- setting aside the foreseeability  
3 conclusion, do you dispute any of Dr. Bursztajn's  
4 opinions about Kelley's mental health?

17:31:59

17:32:04

17:32:08

5 A. I assess that Dr. Webster has a better reasoned  
6 assessment of the facts in this case, compared to Dr.  
7 Bursztajn. But I would have to have you point to me a  
8 specific opinion and we can talk about it. I'm not  
9 ready to make an assertion one way or the other.

17:32:12

17:32:20

17:32:25

17:32:28

17:32:33

10 Q. But in your rebuttal report, you did not  
11 specifically point out any disputes that you had with  
12 Dr. Bursztajn's conclusions about Kelley's mental  
13 health?

17:32:36

17:32:40

17:32:48

17:32:50

14 MR. ALSAFFAR: Objection, form.

17:32:53

15 A. The -- I guess to the extent that I stand by my  
16 report, it was on the issues that I was writing about.  
17 So the knowledge of Devin Kelley's previous violent  
18 conduct, asking the appropriate questions, which is  
19 whether it's paragraph, subparagraph 91C, so I do take  
20 issue with -- I guess what I'm saying, these feed into  
21 each other. And his mental -- Devin Kelley's mental  
22 health is -- evidence of his mental health is a fact for  
23 the finder of fact to assess. And I would -- there was  
24 nothing raised in Bursztajn's report -- how can I put  
25 this? I guess my rebuttal report identified the areas

17:32:53

17:33:14

17:33:17

17:33:22

17:33:29

17:33:34

17:33:38

17:33:42

17:33:49

17:34:00

17:34:08

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1 where I disagree with it. And silence is not 17:34:14  
2 acceptance. So the fact that I may have not commented 17:34:18  
3 on an aspect of his report, doesn't mean I agree or 17:34:21  
4 disagree. It just means I didn't form an opinion on it 17:34:24  
5 and I have no opinion to form on that, if I was silent 17:34:28  
6 on it. 17:34:32

7 Q. Okay. So in Paragraph C here, I'll put this up. 17:34:32  
8 Subparagraph C of Paragraph 91, which was on Page 30. 17:34:53

9 A. Yes, ma'am. 17:34:57

10 Q. In Subparagraph 1 here, you again are stating -- 17:34:57  
11 we have spent a lot of time on this. I don't intent to 17:35:04  
12 go into a lot of detail. You state, "The pattern over 17:35:07  
13 time of becoming aware of the ability to acquire 17:35:13  
14 firearms from FFL certainty conditioned Devin Kelley 17:35:15  
15 that the acquisition of firearms at FFLs was a path that 17:35:20  
16 was available to him." Did I read that correctly? 17:35:24

17 A. Yes, ma'am, you did. 17:35:26

18 Q. And this is based on the same -- your basis for 17:35:27  
19 saying this is the same as your basis for stating your 17:35:33  
20 opinion regarding Kelley's conditioning in other 17:35:37  
21 sections of the report? 17:35:41

22 A. It is, as previously stated, and as previously 17:35:42  
23 clarified on that distinction on the deferral versus 17:35:45  
24 denial on the first two purchases. I still think that a 17:35:51  
25 deferral would have had a deterrent impact, but I am 17:35:57

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1 hoping to being corrected with the definition of

17:36:00

2 information or an indictment on the form.

17:36:03

3 Q. You state that, the next sentence here,

17:36:08

4 "cumulative awareness increased each additional purchase

17:36:14

5 and fostered a chain of events that created a sense of

17:36:20

6 confidence in his ability to acquire any gun he

17:36:24

7 desired." It continues. That's not the end of the

17:36:29

8 sentence. I want to ask you, is there evidence to show

17:36:33

9 that Kelley had an increased sense of confidence in his

17:36:36

10 ability to acquire firearms at FFLs?

17:36:40

11 A. That's a conclusion I drew based on Danielle

17:36:43

12 Smith's discussing his use of weapons and how his, lack

17:36:50

13 of a better word, hobby of weapon use was, the primary

17:36:55

14 source of that is Danielle Smith's deposition. To some

17:37:02

15 extent, there was some additional supporting deposition

17:37:09

16 testimony from his parents, but it's a conclusion that I

17:37:14

17 drew from her testimony and the facts of his continued

17:37:20

18 purchasing, and the fact that -- it's also based on Mr.

17:37:26

19 Barborini's assessment of the modifications he was

17:37:30

20 making and his desire for high quality firearms, I think

17:37:33

21 that was expressed by Mr. Barborini as well. I guess

17:37:41

22 the fact if you looked at the type of the guns he is

17:37:48

23 progressively purchasing, but those were my thoughts.

17:37:51

24 Q. Then in Subparagraph 2 at the bottom of the page

17:37:54

25 and going onto the next page, you state, "Following the

17:37:59

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1 and the effect of those laws? 17:45:13

2 MR. ALSAFFAR: Same objection, calls for 17:45:16  
3 speculation on another individual. 17:45:18

4 A. Again, it's not my place to assess that, though 17:45:20  
5 he does seem to be highly qualified with both his juris 17:45:23  
6 doctorate and his PhD. I just took issue with how he 17:45:30  
7 framed the issues as stated in my report. 17:45:34

8 BY MS. KRIEGER: 17:45:34

9 Q. Do you have any particular expertise in the laws 17:45:37  
10 related to firearm sales or the effects of those laws? 17:45:39

11 A. I would say I do now. So I would say that I have 17:45:43  
12 learned quite a bit in preparing for this case, about 17:45:56  
13 the National Instant Criminal Background Check System, 17:46:01  
14 the Gun Control Act, the Brady Gun Control Act, the 17:46:09  
15 Lautenberg Amendment. And so certainly this experience 17:46:14  
16 has enhanced my knowledge. 17:46:20

17 Q. That's fair. Outside of your -- outside of the 17:46:24  
18 research and documents that you have reviewed for this 17:46:30  
19 case, do you have any other expertise in laws related to 17:46:34  
20 firearm sales and the effect of those laws? 17:46:39

21 A. Firearm sales and the effect of those laws, I 17:46:42  
22 would say only the research that I have conducted since 17:46:47  
23 being retained in September of 2019, so however many 17:46:53  
24 months that is, a year and several months worth of 17:46:59  
25 experience. 17:47:03

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1 (Recess from 5:50 p.m. to 5:51 p.m.) 17:50:45

2 THE VIDEOGRAPHER: We are back on the record. 17:52:06

3 The time is 5:51. 17:52:07

4 BY MS. KRIEGER: 17:52:12

5 Q. Colonel Youngner, do you have any reason to 17:52:12

6 dispute that Dr. Fox is an expert in criminology and 17:52:16

7 specifically in mass shootings? 17:52:19

8 MR. ALSAFFAR: Same objection, calls for 17:52:22

9 speculation. 17:52:23

10 A. Again, I'm speculating what his qualifications 17:52:28

11 are. I read his record. He seems to be a very educated 17:52:31

12 man on those subjects, and I would not be surprised if 17:52:35

13 the judge did determine he was qualified as an expert. 17:52:39

14 BY MS. KRIEGER: 17:52:41

15 Q. Do you have any expertise in criminology, other 17:52:41

16 than your experience as a prosecutor? 17:52:55

17 A. Three years of law school, and LLM and 35 years 17:52:56

18 of legal experience; I mean, so other than those 17:53:00

19 experiences stated in my CV, no. But what's the 17:53:08

20 distinction between being a criminal prosecutor and 17:53:12

21 criminal defense counsel, and criminology? I have taken 17:53:16

22 courses in juris prudence and the philosophy of law and 17:53:20

23 reasons why we prosecute and punish. So I -- 17:53:24

24 Q. Well, let me -- sorry. Go ahead. 17:53:28

25 A. So I mean, I don't have a PhD in Criminology, but 17:53:30

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1 I have a juris doctorate and LLM in aspects -- actually,  
2 my LLM is in military law which includes military  
3 justice. So I let that record speak for itself. So I  
4 do have those qualifications. And I would leave it to  
5 the court to determine whether those are appropriate in  
6 the field of criminology as well as criminal law. I  
7 would say I am an expert in criminal law.

17:53:34  
17:53:38  
17:53:43  
17:53:46  
17:53:49  
17:53:52  
17:53:55

8 Q. Do you have any -- have you done any research  
9 regarding the statistics of crimes?

17:54:01  
17:54:03

10 A. I have not conducted research. I have read the  
11 reports of obviously the experts in this case. And so I  
12 would say I'm not a research scientist, if you will, or  
13 -- I guess would you even call this a science? I'm not  
14 a research statistician.

17:54:10  
17:54:14  
17:54:19  
17:54:26  
17:54:40

15 Q. Do you have any -- other than the work that you  
16 have done for this case, do you have any expertise in  
17 mass shootings?

17:54:42  
17:54:48  
17:54:48

18 MR. ALSAFFAR: Objection, form. Sorry. What is  
19 that? I'm not sure that is an expertise that exists.

17:54:55  
17:55:01

20 A. I've represented someone --

17:55:04

21 MR. ALSAFFAR: You might need to define that a  
22 little more.

17:55:07  
17:55:09

23 A. I mean, sure. I will tell you, I have the  
24 experience representing someone accused of negligent  
25 homicide, the deal of 16 people. Two Black Hawk

17:55:09  
17:55:13  
17:55:18



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1 helicopters were shot down. It was a different kind of  
2 mass shooting. It was a mistake by two fighter pilots  
3 who shot down the wrong aircraft. But it was a mass  
4 murder and they were charged with negligent homicide.  
5 And that case was about two years worth of my life. So  
6 -- but I would not hold myself out to be the same type  
7 of expert as Dr. Fox, if that's what you're getting at.  
8 I do think I have a criminal law background, criminal  
9 law experience, particularly military criminal law  
10 experience, and experience advising -- it's already on  
11 the record in my CV, but IGs, OSIs, and security forces.  
12 And when it comes to looking at the data reported by  
13 GAO, by Dr. Fox and others, I can then, based on my  
14 experience, form an opinion which I provided in these  
15 reports. It may be contrary to his, but I like to point  
16 out that what was missing the gaps, and I think it's  
17 appropriate. I didn't have to be a criminologist to  
18 identify the gaps. I just had to be a good criminal  
19 lawyer.

20 Q. Have you done any research into mass shootings?

21 A. Only what I read for this case. I've not done  
22 any independent research prior to this case.

23 Q. And you disagree with Dr. Fox's opinion that it  
24 was not foreseeable to the Air Force that Kelley would  
25 engage in the type of conduct that caused Plaintiffs'

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1 injuries. And that's Paragraph NICS; correct? 17:57:04

2 A. I assess that it was, in fact, foreseeable that 17:57:07  
3 Kelley would engage in this act. And the Air Force 17:57:20  
4 should have anticipated the dangers that their failure 17:57:22  
5 to submit criminal history data to the FBI had. And by 17:57:23  
6 failing to do so, they increase the risk of harm every 17:57:28  
7 time they fail to comply with that requirement. 17:57:32

8 Q. So in summary, you disagree with Dr. Fox's 17:57:35  
9 assessment regarding foreseeability; is that fair? 17:57:45

10 A. That's fair. I think he uses the wrong legal 17:57:47  
11 standard for it. I think he should apply the same 17:57:50  
12 standards that Judge Rodriguez has. 17:57:53

13 Q. I think in Paragraphs 102 and 103, you also 17:57:57  
14 express your disagreement with Dr. Fox's assessment of 17:58:02  
15 the GAO report of September 2018; is that fair? 17:58:07

16 A. Well, yes, because what it does is he points out 17:58:14  
17 there's only a 0.01 percent likelihood of prosecution 17:58:18  
18 and it ignores the facts -- so it cherry picks data and 17:58:21  
19 says there's only 12 cases. What a low number. And it 17:58:26  
20 ignores the impact states have. And just looking at it 17:58:30  
21 alone, we see two states out of 50 that had 600 -- doing 17:58:33  
22 math in public here, 613 successful prosecutions. So it 17:58:39  
23 discounts the state interest. And Oregon and 17:58:45  
24 Pennsylvania were cited. It didn't have a number for 17:58:49  
25 the convictions other than it was a high number. 17:58:52

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1 priority. If they have a domestic violence case, they 18:00:39  
2 are going to look at it. So I would, for those reasons, 18:00:41  
3 disagree with Dr. Fox. That's the basis for my 18:00:44  
4 disagreement. 18:00:47

5 Q. So you mentioned the -- Dr. Fox doesn't address 18:00:48  
6 the deterrent effect of the approximately 100,000 18:00:55  
7 denials, the deterrent effect of those weapons not being 18:01:01  
8 on the street. Does the GAO report address the 18:01:06  
9 deterrent effects of denials? 18:01:10

10 A. Well, the -- the -- so in context, I don't recall 18:01:13  
11 right now that it does, but the point was Dr. Fox 18:01:18  
12 dropped a footnote in his report and references GAO 18:01:23  
13 report to basically say look, you can have 100,000 18:01:27  
14 weapons taken, only 12 get prosecuted; without saying 18:01:30  
15 anything, being silent on the role of states which had a 18:01:34  
16 dramatically -- the difference between 12 and 472 in 18:01:42  
17 Pennsylvania, 12 nationwide and 141 in Oregon. And 18:01:46  
18 won't speculate as to how many the other 47 or 48 states 18:01:51  
19 had. But that is a substantial -- if I take that 18:01:55  
20 average, let's say it's 200 times 50 states, we are now 18:01:57  
21 getting into numbers that again, might be low, but if 18:02:02  
22 that's -- if any one of those 1,000 are Devin Kelley, 18:02:06  
23 then you just prevented a mass murder potentially. 18:02:11

24 So the GAO report, to answer your question, I 18:02:14  
25 don't recall whether it got into that analysis. But 18:02:17

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1 again, Dr. Fox cherry picked the data to try to bolster  
2 his opinion without being honest about the rest of the  
3 report. I shouldn't say honest. Without being  
4 forthright about the rest of the data that would hurt  
5 his opinion; it would certainly make his opinion more  
6 questionable and less strong for the Defense.

7 Q. Is it your opinion that being denied at an FFL  
8 has a deterring effect?

9 A. Yes, it is.

10 Q. What is the basis for that opinion?

11 A. First of all, the -- let me just answer.

12 Go ahead, please.

13 Q. I was just going to restate the question. Does  
14 being denied at an FFL, in and of itself, separate from  
15 any investigation or prosecution, have a deterrent  
16 effect? And what is the basis for that opinion?

17 A. I assess that it does, based -- I believe Dr.  
18 Webster wrote about this in his report. And secondly,  
19 my common sense and knowledge of the ways of the world.  
20 You have folks -- third, my basis is that Devin Kelley's  
21 comments about not wanting to go back to jail, to avoid  
22 police, Devin Kelley appears to be the kind of person  
23 who does not want to have ATF knocking on his door, does  
24 not want to have a deferral investigated or a denial  
25 investigated. So taking together all of those sources

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1 of that information, that forms the basis of my opinion.

18:03:53

2 It is not just speculation or a guess on my part.

18:03:56

3 Q. And you also refer to -- you say in Paragraph

18:03:59

4 102, I assess that these investigations had a chilling

18:04:05

5 effect on those who submitted those 12,710 applications

18:04:10

6 to FFL dealers. That's referring to the 12,710

18:04:14

7 investigation that were, in fact, done. What is the

18:04:19

8 basis for your assessment that investigations had a

18:04:24

9 chilling effect on those investigated?

18:04:28

10 A. Again, the -- I'd have to go back to what I read

18:04:30

11 from Dr. Webster's declaration and report. And that

18:04:40

12 would be a basis as well as again, my knowledge and

18:04:47

13 experience in dealing with criminals. It is not -- and

18:04:51

14 with what Devin Kelley said again. I didn't talk about

18:04:58

15 Devin Kelley in that sentence. I just talked about

18:05:05

16 those particular applicants. And I'd have to go back

18:05:09

17 into the GAO report itself, because I believe there was

18:05:11

18 comment.

18:05:15

19 Actually, in addition to that, I want to say that

18:05:15

20 Ms. Del Greco addressed in her -- so this would also be

18:05:17

21 a basis for this. I don't have hers in front of me, but

18:05:22

22 her deposition talked about the purpose of NICS and how

18:05:25

23 those denials, so there were a couple of -- I keep

18:05:31

24 thinking of Del Greco in particular. I don't know why

18:05:38

25 closing my eyes helps me think, embarrass myself.

18:05:42

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1 I believe Ms. Del Greco commented that the -- she 18:05:46  
2 talked about the mission statement of NICS. And as I 18:05:51  
3 take away, the fact that there were denials has -- the 18:05:54  
4 implication I had is that denials and even deferrals can 18:05:58  
5 have a deterrent impact. And then there was some other 18:06:02  
6 study that talked about domestic violence and future 18:06:13  
7 offenses. So I extrapolated that many GAO reports 18:06:17  
8 talked about how many were for domestic violence and how 18:06:20  
9 many were for falsified statements. They broke out 18:06:23  
10 categories. And I think the PowerPoint chart that Del 18:06:26  
11 Greco had in one of her PowerPoint charts, a breakout of 18:06:30  
12 the categories of basis for either denial or deferral. 18:06:34  
13 So all taken together, and on top of that, my 18:06:39  
14 common sense and knowledge and experience, would lead me 18:06:44  
15 to reach that opinion. Those are the bases. 18:06:51

16 Q. Do you cite in your report here that Webster's -- 18:06:53  
17 Webster's research or his report is the basis for 18:06:59  
18 concluding that there is a chilling effect? 18:07:03

19 A. I cited it as a basis for all of my opinions. I 18:07:05  
20 cited that I had read his report and his declaration. 18:07:09  
21 So there's a point in my report where I noted all the 18:07:14  
22 documents I read and relied on to form these opinions. 18:07:20  
23 It was noted in there as one of the opinions. I'd have 18:07:23  
24 to go open up and look, but I'm highly confident that I 18:07:27  
25 cited both his report and his declaration. And it's in 18:07:31